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Supreme Court of the United States,

OCTOBER TERM, 1902.

NO. 220.

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JAMES H. McKENNEY,
Clerk.

MARC HUBBERT, - - - - - - - - Petitioner

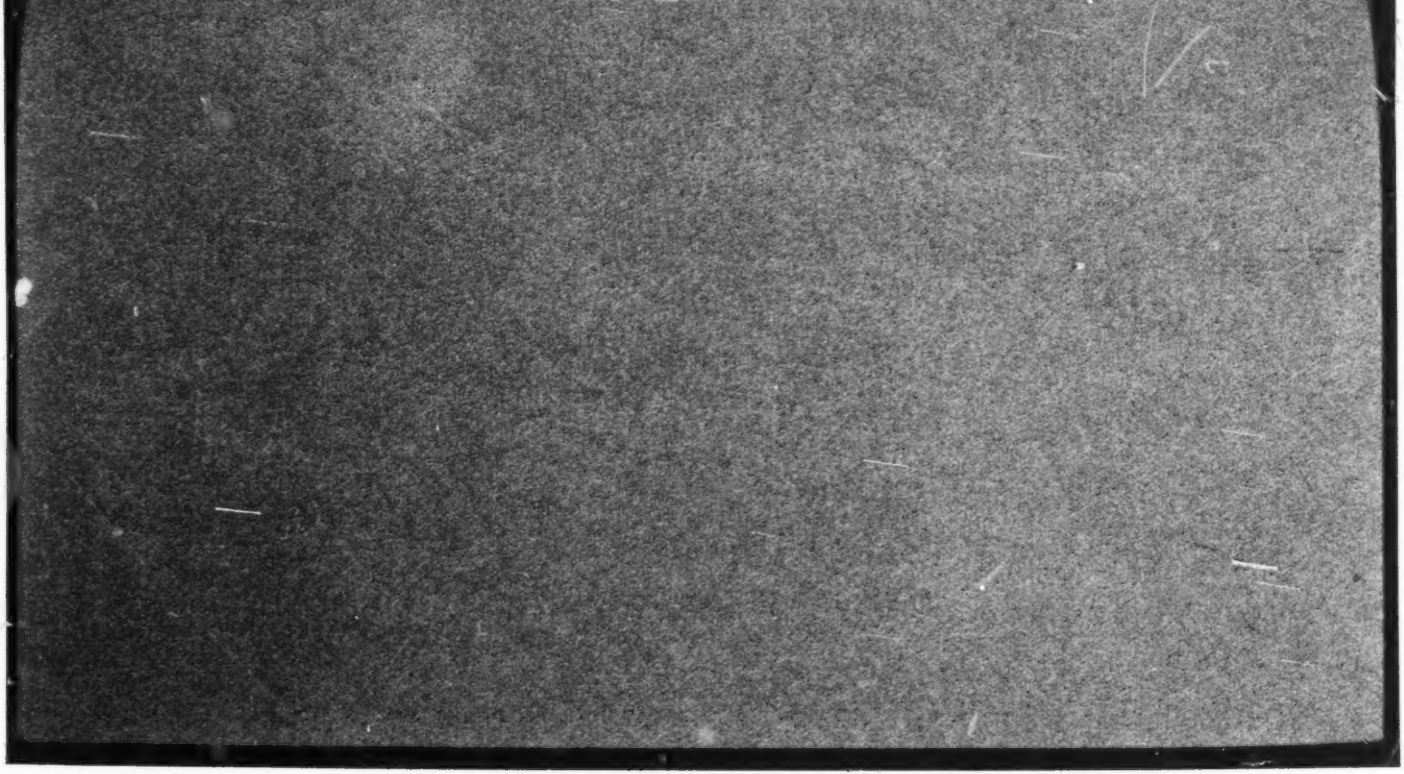
vs.

CAMPBELLSVILLE LUMBER COMPANY.

Brief of Argument for Respondent.

ERNEST MACPHERSON,
COUNSEL.

Geo. G. Fetter Printing Co., Louisville.



No. 293.

Supreme Court of the United States

OCTOBER TERM, 1902.

MARC HUBBERT, - - Petitioner,

vs.

CAMPBELLSVILLE LUMBER COMPANY, - - - - - - Respondent.

Brief for Respondent.

This case is before the Court on writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Western District of Kentucky, which overruled a motion of the Campbellsville Lumber Company to set aside, as void, a judgment rendered, and execution against it in a case to which it was never in any way a party. See same case below, 50 C. C. A., 435.

Marc Hubbert brought a common-law action in the Circuit Court of the United States for the then District of Kentucky against Taylor County, Kentucky, on coupons of bonds issued by the county, and obtained judgment by default for the sum of $2,963.13, with interest at the rate of 6 per centum per annum from the 10th day of April, 1899 (the date of the judgment), until paid. An execution was issued and returned "No property found." In the same case, at a subsequent term of the court, on the 13th day of July, 1900, Hubbert moved the court to refer the action to a commissioner, with instructions to ascertain and report, on a day to be named, the amount which it would be necessary for the owners or holders of real and personal property in Taylor county subject to taxation under the revenue laws of the State, to pay, in order to raise promptly in proportion to the value of such

property owned by each, a sum sufficient to discharge the judgment and the costs of collecting it, making due allowance for probable delinquencies; and on the 16th day of July, 1900, an order was entered, referring the case to a commissioner therein appointed, with orders to ascertain and report, on or before the time in the order fixed, the amount which it would be necessary for the owners or holders of all real and personal property in Taylor county subject to taxation under the revenue laws of the State of Kentucky to pay, in order to raise promptly and in proportion to the value of such property owned by each, a sum sufficient to pay the judgment and all costs of the suit and the costs of collecting the same, making due allowance for delinquencies as above stated. An objection to the motion was made by Taylor county and overruled, and thereafter the commissioner made a report, in which he assessed against many, but not all, the property owners of Taylor county, various sums of money, amounting in the aggregate to $14,180.77 (Record, page 62). The commissioner also showed that he had made a publication of a notice of the filing of his report in the Lebanon Enterprise, a newspaper published in Marion county, Kentucky, which notice may be found in the Record at page 19. On the 12th of January, 1901, this report was confirmed (Record, page 21) and a judgment was rendered thereon against all the taxpayers and property holders of Taylor county named in the report. The judgment declares:

> "It is considered that the said report be, and the same is, hereby approved and confirmed, and that the plaintiff, Marc Hubbert, is entitled to recover judgment against *each of the taxpayers* in said report *for the amounts therein named*, and that at the expiration of ninety days from this date several executions shall issue against *all said persons* who have not *then paid to the marshal of this court* the sums reported to be due by them respectively, which executions may be levied *on any* property subject to taxation for State revenue purposes held by the defendants or which were so held by them at the date of the judgment." (Italics ours.)

By this last judgment Hubbert's original judgment for

$2,963.13 with interest thereon at the rate of 6 per centum per annum from the 10th day of April, 1899, was expanded into a judgment in his favor for the sum of $14,180.77. The petitioner, before resorting to these anomalous proceedings, never made any demand upon the officers of Taylor county, having control of its fiscal affairs, to assess, levy or collect any tax to pay his first judgment, and never filed a petition for a mandamus.

The record shows that no actual notice of this judgment was ever given to any of the taxpayers of Taylor county; that no one of them had ever been a party to the action, or had entered his appearance; that no summons or other process was ever issued against any one of these people who were required to pay these moneys to the marshal, and that if each of the taxpayers had complied with the judgment of the 12th of January, 1901, Marc Hubbert would have received, through the marshal, nearly five times the amount of his original judgment on his coupons.

The coupons sued on were cut from bonds which on their face recited that they were "authorized by an Act of the General Assembly of the Commonwealth of Kentucky, Approved March 18, 1878." The requirements of this Act were ignored by the petitioner. The Act is published in full as Appendix A to this brief.

The proceedings of the petitioner in the Circuit Court, without judicial precedent and so shocking in their results, were, and are sought to be, justified under the provisions of a special and private act of the Legislature of Kentucky, entitled "An Act to amend an Act entitled 'An Act for the benefit of Taylor county, empowering it to compromise its debts, issue bonds and levy and collect taxes to pay the same, approved March 18th, 1878,' approved February 27, 1882." The act is published in full as Appendix B to this brief. The Act of 1882 was not mentioned in the bonds or coupons of the petitioner, nor did he comply with its terms, and particularly section 10 thereof, which is in these words:

> "Sec. 10. The bonds to be issued under the act to which this is an amendment, shall, on their face, stipulate that the holders of any of them, or any coupon thereof, shall be entitled to the remedies for the col-

lection for the same herein, and in the act to which this is an amendment, provided for."

It appears on the face of the judgment and report, and will be shown more in detail hereafter, that the commissioner did not assess or levy the sums imposed upon the various property owners in accordance with any rule of uniformity, or in proportion to the property owned by each taxpayer. Executions on the last judgment were issued against ten of the leading property owners of Taylor county, and among these against the Campbellsville Lumber Company, respondent herein, for the sum of $123.76 and costs. This execution was the first knowledge had by the lumber company of the action or proceeding, and promptly thereupon it moved the court to set aside the judgment against it and to quash or recall the execution (Record, page 65). Affidavits in support of the motion were filed by the lumber company (Record, pages 64 to 72). The motion was overruled, and thereafter, by writ of error, the order of 28th of May, 1901, overruling its motion was brought for revision before the United States Circuit Court of Appeals for the Sixth Circuit, which reversed as void the judgment of the Circuit Court for the Western Kentucky District; and by *certiorari* the case is in this court for review.

Argument.

At the outset it should be understood that the respondent is not opposing the payment by Taylor county of any of its obligations, nor the imposition of just assessments or taxes upon persons or property in the county; nor to any proceedings which shall compel the fiscal officers of the county to perform their duties. The Campbellsville Lumber Company is a mere private corporation, doing business in Taylor county, and has no voice or vote in the selection of public officials. It stands ready to pay promptly its share of the public burdens of the county. It does not seek to impair the validity or collectibility of the bonds of the county.

Respondent objects to the proceedings had in the Circuit Court, because if they are allowed to stand, the Lumber

Company and a few of the other property owners may be compelled to pay the entire railroad indebtedness of the county, without giving it any hearing and without reference to any principle of equality or uniformity in the imposition of the burden.

I.

> "The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which alone it can act." (Chief Justice Waite, in East Tenn., Va. and Ga. R. Co. v. Southern Tel. Co., 112 U. S., 306, bk. 28, L. ed., 746.)

If the Act of 1882 be valid and available to Hubbert, its provisions were not followed in the court below. Section 3 is in part as follows:

> "If the court rendering such judgment (on bonds or coupons) shall be of opinion that such serious obstruction is likely to be offered to the enforcement of any such judgment as will materially delay it, it shall, on the motion of the plaintiff therein, refer the same to a commissioner with instructions to ascertain and report, on a day to be by it named, the amount which it will be necessary for the holders or owners of any such property to pay, in order to raise promptly in proportion to the value of such property owned by each a sum sufficient to pay the said judgment and all costs of the said suit and the costs of collecting the same, making due allowance for probable delinquencies."

The petitioner, Hubbert, in support of his motion to refer, filed, on the 13th day of July, 1900, his affidavit (Record, page 70) stating that public sentiment of the citizens was hostile to the tax, and that there was no sheriff in the county.

There was no fact stated in the affidavit to show that the county officers had failed to levy taxes for the payment of the bonds; there was no statement that any demand had ever been made upon any official of the county to perform any

duty which had been refused; there was and could have been no statement made showing that a sheriff was a necessary officer in the collection of taxes; there was no fact intimated or stated in regard to the "collector" of the tax prescribed by law. It stated generally and superficially the conclusions of the pleader or draftsman. This affidavit was the only basis of the "opinion" of the Circuit Court that a commissioner should be appointed, and this was done by the order of the 13th of July, 1900 (Record, pages 13 and 14), in terms following the language of section 3, above quoted. Hubbert's judgment (Record, page 13) was for $2,963.13, with interest from the 10th of April, 1899. The commissioner had no right, if legally appointed under the Act of 1882, or under the order of the court appointing him, to do more than to ascertain and report the amount which it would be necessary to raise in order to pay promptly $2,963.13 and the interest thereon and costs. He reported, however, that it would be necessary to raise $14,180.77 (Record, page 62). Let us suppose the costs to amount to $500.00, a monstrous supposition; this would have required say, $3,500.00, at the outside, to pay the debt, interest, costs and costs of collection; and had this amount only been assessed against the property owners of the county, it would have satisfied, and more, any sort of just claim Hubbert could have desired to enforce.

There was no authority in the Act of 1882 to do more than this, and the levy, assessment, action or proceeding being by virtue of a special statutory power in relation to taxation anything done by the commissioner or by the court not by the act expressly authorized was void.

A tax not assessed as provided by law can not be enforced. Cooley on Taxation, 2d edition, page 429; East Tennessee, etc., R. R. v. Morristown (Tenn. Chan., 1895), 35 S. W. Rep., 771; Clegg v. State, 42 Texas, 609; People v. Central Pac. R. R. Co., 83 California, 398.

II.

The assessments and levies made by the commissioner were not according to the rule of uniformity and equality commanded by the Constitution of Kentucky, nor according

to the expressed terms of the act under which the pretended levies herein were made.

The present Constitution of Kentucky, section 171, contains this clause in relation to taxes:

> "They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax."

The Court of Appeals of Kentucky held, in the case of Holzhauer v. City of Newport, 15 Kentucky Law Reporter, 188, that while this constitutional provision was not in the former Constitution, it is but declaratory of what has always been the law of taxation in this State.

In the report of the commissioner (Record, page 39) under the heading, "Dist. No. 3," the respondent was thus assessed:

THE CAMPBELLSVILLE LUMBER COMPANY.

Land	$1,000.00
Town Lots	850.00
Personal	6,990.00
Total	8,840.00
Tax	123.76

This sum of $123.76 is nearly one twenty-third of the entire judgment which Hubbert recovered against Taylor county. The commissioner's report shows that the assessed value of the property in Taylor county subject to taxation under the revenue laws of Kentucky is about $1,000,000.00, and he reported the Campbellsville Lumber Company as the owner of property subject to taxation to the amount of $8,840.00, which is less than one one hundred and thirteenth of the whole. But, instead of assessing the Campbellsville Lumber Co. in this proportion, the commissioner levied a tax nearly five times as great as the proper ratio. The inequality and absurdity of his assessments appear time and again in the report which was confirmed and made part of the judgment. For example, the Louisville & Nashville Railroad Company is put down as owning $51,960.00 of property subject to assessment in the county (Record, page 62); the plaintiff obtains a judgment against it for $727.44. In other words, this road owns about one-twentieth of the

property in the county, but was assessed for about one-fourth of Hubbert's claim.

The same disproportion occurs on the same page in the assessment against the Bank of Campbellsville of $700.56. The railroad, the bank and the lumber company were assessed for $1,551.76, more than half of Hubbert's claim.

"A levy upon property, in excess of the proportionate amount necessary to be levied upon it to produce the sum required to be raised is unauthorized by law." Porter vs. Rockford, etc., R. Co., 76 Ill., 564.

In Commonwealth v. Hamilton Manufacturing Co., 12 Allen (Mass.), 300, it was said:

> "The decisive reason why it can not be supported as a tax on property . . . is, it is not laid according to any rule of proportion whatever, but is imposed only on the corporations designated in the act without any reference to the amount required to be raised by taxation for public purposes," etc.

There was no mistake, unintentional error, or clerical misprision in any of the assessments or levies. It was designed to impose excessive levies in order that a few leading property owners might be compelled to pay the entire debt. The excessive levies were distributed on the whole roll.

> "All statutes are mandatory which expressly or by implication limit the amount of taxes which may be levied. When these are exceeded by a sum which is spread upon the whole roll, the whole levy is void. The levy is in excess of the jurisdiction of the officers, and will be as deficient in the legal competency to make out a valid charge as if made without any authority whatever." Cooley on Taxation, 2d Ed., 429, citing many cases, including Commonwealth vs. Savings Bank, 5 Allen, 428, 430; Huse vs. Merriam, 2 Greenl., 375, 376; Case vs. Dean, 16 Mich., 12.
>
> "Unjust discrimination in imposing taxation when inequality is necessarily produced has never met the approval of this court, but, on the contrary, has always been held to be unconstitutional," etc. Re-

mark of Judge Pryor in Cin., N. O. & T. P. R. R. Co., etc., vs. The Commonwealth, 81 Ky., page 509.

It is elemental and fundamental law that where constitutional or statutory provisions require equality and uniformity of taxation, conformity to their requirements is an imperative prerequisite to the validity of the tax or assessment imposed in a State or municipality where such provisions are declared.

If a Federal Court in Kentucky may assess and levy taxes, something that no State Court of general jurisdiction may do, the court should be governed by the same principles as rule the conduct of assessors generally.

III.

In "making due allowance for probable delinquencies," as directed in the Act of 1882, the commissioner was not authorized to impose the whole debt of Hubbert on a few of the taxpayers. What is "due allowance?" "*Due* means that which law or justice requires to be done. *Due* rights mean just rights, legal rights." Ryerson v. Boorman, 8 New Jersey Equity, 705.

Due, according to the dictionaries, also means proper, becoming, reasonable. Were the allowances made by the commissioner and court below just, proper, becoming or reasonable? Only a few executions were issued on Hubbert's second judgment. (See affidavit, Record, page 69.) Ten taxpayers were selected, against whom executions were issued.

In allowing for "probable delinquencies," the commissioner went upon the theory that all the hundreds of other property owners would not pay; that the probable delinquents would be 2,160 of the 2,170 and more taxpayers named in his report and against whom judgment was rendered for the amounts respectively set opposite their names, and that only a few would not resist payment. This was not "due allowance." It was arbitrary, unjust, improper and unreasonable. It placed a premium upon the delinquent taxpayer and punished the property owner who was willing to abide by the law.

The framers of the Act of 1882 never contemplated or in-

tended to authorize such a result, and the whole proceeding was without the slightest justification under this special law, and from beginning to end a nullity. It may be presumed that all assessors anticipate some delinquencies, but they do not for that reason assess or levy taxes upon any person or property, without reference to the amount required to be raised for public purposes. The law requires the taxes for this sum, and no more, to be levied equally upon the property of all, with the assumption that all will pay, and any other scheme would violate the essential and elemental principles of equality and uniformity.

If the ten taxpayers, including the Campbellsville Lumber Company, against whom executions were issued for Hubbert's claim, had promptly settled with the marshal, although knowing they were paying an extortionate demand, they would have been guilty of a great folly not only, but would thereby have served notice upon other bondholders that they stood ready to assume the entire indebtedness of Taylor county; for if they were thus liable to Hubbert, any other holder of bonds or coupons could institute a similar proceeding under the special law, obtain judgment, without notice, have another like assessment, and issue his execution against the same ten individuals, and this process could be repeated until they had paid the whole $125,000 of the railroad obligations of the county. It seems to counsel for the respondent that no court, upon proper consideration, could sanction any law or any construction of any statute, leading to results so disastrous to the citizen or corporation willing to bear and promptly to pay their just proportion of the public dues.

Nor was the excessive assessment and levy against the respondent authorized by section 8 of the Act of 1882. That section reads:

> "The court shall make orders for the safe-keeping and disposition of the money to be collected under this act; and if the amount collected shall be more than necessary to pay the judgment and costs, the residue shall be paid over to the commissioner of the sinking fund of said county, to be used for the payment of the principal and interest of bonds issued under the act to which this is an amendment."

The court, in its final judgment, made no orders for the safekeeping and disposition of the money; it never retained the case for any purpose, and there is no such office or officer as the commissioner of the sinking fund of Taylor county.

"If the amount collected shall be more than necessary to pay the judgment and costs" does not require that the amount shall or should be more. The words just quoted imply the contrary. But were it held that in certain contingencies something over the judgment and costs might be collected, and the excess paid over to some officer of the county, this would not impart validity to the assessments made by the Circuit Court; executions against a few taxpayers would satisfy the claim of Hubbert, and there would be no more collected, and the whole burden would still remain on these few property owners, and every objection herein urged remain in force.

IV.

The notice published by the commissioner in the Marion county paper was insufficient. It gave the style of the court and case, and then read:

> "Notice is hereby given that I have filed in court my report in the above case, showing the amount which it will be necessary for each of the taxpayers of Taylor county to pay, in order to pay off the judgment herein and that said report is subject to exceptions to be filed in the clerk's office, until January 7, 1901." (Signed) "David L. May, Commissioner." (Record, page 63).

Giving the utmost effect to this publication, it simply indicated that the taxpayers of Taylor county should be assessed to pay the original judgment of Hubbert. That was the "judgment" referred to, because there had then been no other judgment. His motion for the appointment of a commissioner (Record, page 13), was that he "moves the court to refer this cause to a commissioner with instructions to ascertain and report on a day to be named in the order, the amount which it will be necessary for the holders or

owners of real and personal property in Taylor county, subject to taxation under the revenue laws of the State, to pay *in order to raise promptly, in proportion to the value of such property owned by each, a sum sufficient to discharge the judgment herein and all costs of collecting the same* (italics ours), making due allowance for probable delinquencies."

> "When notice is given by publication, and the defendant does not appear, the court does not acquire jurisdiction to grant any relief, except that demanded in the petition or complaint." Vorce v. Page (Nebraska), 44 N. W. Rep., 452.

It is certain that by this notice the Campbellsville Lumber Company was not warned that it would be required to pay one twenty-third of Hubbert's judgment against Taylor county.

There were other defects in this notice. The act of 1882 (section 5) permitted a publication "in Taylor or Marion county." Why did Hubbert cause the publication to be made in Marion county and not in Taylor county, where the property lay and the people to be affected resided? The record is silent on this question. Did he select a foreign county with the expectation or hope that his "notice" would never be seen? Did he believe the people of Taylor county read their own home paper and were not subscribers to the papers of other counties? Has any attempt been made by Hubbert to show that the Marion county paper circulates extensively or at all in Taylor county, or that at Campbellsville, its county seat, there is no paper? But no matter where published, the notice was addressed to no one, described no property, and named no taxpayer. "Service by publication can be had only against persons who have been made defendants, and service against a person not named in the bill and complaint as a defendant is a nullity." Hansen vs. Klicha, 78 Ill. App., 177. The affidavit of Walling (Record, page 66) shows that "neither the Campbellsville Lumber Company nor this affiant ever had any knowledge of or notice of the said judgment (the last judgment or execution) until and not before thirty-four (34) days prior to the date of this affidavit (May 24, 1901); that the Campbells-

ville Lumber Company had no opportunity to defend" before the time of its motion to set aside the judgment against it on the ground that it was void.

In another affidavit (Record, page 69), it is stated and was never contradicted "that if it were desired or ever had been desired in this case to serve any process upon the Campbellsville Lumber Company, which is a corporation organized and existing under the laws of Kentucky, and doing business in Taylor county, it would have been an easy matter to give to said company notice or serve process upon it."

> "In Lot Two vs. Swetland, 4 Greene (Iowa), the court said: "It is the obvious policy of the law to secure actual service of notice upon a party against whom judicial proceedings have been commenced, and unless a court is satisfied that every reasonable effort has been exhausted to secure actual service, the uncertain method of giving notice by publication should not be resorted to."

Two cases were relied on in the lower court as justifying the notice by publication given in the case at bar. They have no bearing in this case. It is conceded by every one that under public and general laws in relation to taxation notice to the taxpayer by publication in a newspaper where the property sought to be affected is situate may be sufficient. It is denied by respondent that in a judicial proceeding whether in a State or in any Federal Court a notice other than actual under a special and private statute can authorize a personal judgment against a defendant.

In Lent vs. Tillson. 140 U. S., 316-326, it was decided that, under a general and public law, in relation to street assessments, a notice by publication for not less than ten days in two daily newspapers in the city of San Francisco, where the property was situate, was sufficient to bind those affected on the particular street proposed to be improved and mentioned in the publication.

In Paulsen vs. City of Portland, 149 U. S., 30-40, it was said:

> "It would seem that when notice was in fact given, notice whose sufficiency is not challenged," etc.

What relevancy these cases may have to the notice now under consideration, it is difficult to perceive.

V.

Reviewing this case, it will be observed that Hubbert, in his affidavit, which was the basis of the whole proceeding, failed to show that he was entitled to the remedies he sought to obtain. Section 10 of the Act of 1882 provided that "the bonds to be issued under the act to which this is an amendment shall, on their face, stipulate that the holders of any of them, or any coupon thereof, shall be entitled to the remedies for the collection for the same herein, and in the act to which this is an amendment, provided for." His affidavit set forth no such stipulation, and the affidavit of Walling (Record, page 67) shows that none of the bonds ever issued by Taylor county contained the stipulation. A form of the bonds and coupons was filed with Walling's affidavit (Record, page 68), and this contains no reference to or mention of the Act of 1882, or section 10 thereof.

Section 10 required, as a condition precedent to the exercise of the remedy given by the Act of 1882, that the coupons, or bonds, should, on their face, have contained the stipulation that the remedy was available.

By the opinion of the Circuit Court of Appeals (Record, pages 83-87) it was decided that section 10 was a mandatory provision and that in the absence from the bond of this stipulation the remedies provided in the Act of 1882 could not be enforced.

There is no hard and fast rule for determining whether an act be mandatory or directory, but the language of section 10 is imperative, and it is conceded that the provision was disregarded so far as the coupons herein sued on are concerned. Respondent disclaims the contention that the failure to incorporate in the bonds and coupons the provision that the holders thereof should be entitled to the remedy under the Act of 1882 rendered the bonds invalid. It is, however, confidently urged that the absence of that stipulation deprived the holders of the bonds or coupons issued by Taylor county of the remedy given in the Act of 1882. The Legislature of Kentucky had some intention,

when section 10 was inserted in the act. There could have been but one purpose for its insertion. The evident and only reason for it was that, unless the bonds and coupons contained the stipulation, the remedy would be unavailable. If an affirmative statute, introductive of a new law, directs a thing to be done in a certain manner, that thing can not, even though there are no negative words, be done in any other manner. Cook v. Kelly, 12 Abb. Pr., 35; Commissioners of the Poor v. Gains, 3 Brev., 396. The books abound with authorities sustaining the proposition that a statute introductive of a new and extraordinary remedy shall be strictly pursued, and more especially when it is to operate against a municipality or its people.

VI.

The purchaser of municipal securities is bound by the statute therein recited, and may not invoke the aid of another statute not referred to in his bond without bringing himself within its terms.

In McClure vs. Town of Oxford, 4 Otto, 429, Bk. 24, L. Ed., 129, the Chief Justice said:

> "Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements. . . . These bonds, therefore, carried upon their face unmistakable evidence that the forms of the law under which they purported to have been issued had not been complied with, because thirty days had not elapsed between the time the law took effect and the date of the election. If a purchaser may be, as he sometimes is, protected by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true."

The validity of the same bonds came before the court in the later case of Crow vs. Township of Oxford, 119 U. S., 215, Bk. 30, L. Ed., 390, wherein Mr. Justice Blatchford said:

"The whole point of the contention in favor of the validity of the bonds is based on the proposition that the bonds were in fact issued under the authority of, and in compliance with, the provisions of the Act of March 2, 1872, instead of the Act of March 1, 1872. The plaintiff, being referred by the bonds to the Act of March 1, 1872, as the statute under which they were issued, was bound, as was said in the McClure case, to take notice of the statute and all its requirements. If, finding the bonds invalid under that statute, as he is held by law to have done, he claims the right to refer to the Act of March 2, 1872, as the source of authority, because that Act was in force from March 7, 1882, he was bound to take notice of the requirements of that Act. . . . The recitals in the bonds could not avail him, because as to the only Act recited, that of March 1, 1872, that Act was not in force long enough before the election to allow the required notice to be given, and, as to the Act of March 2, 1872, the records, which showed proceedings not in conformity with it, and the bonds, *by the absence of all reference to it, and by their* recitals as to the Act of March 1, 1872, excluded the *possibility that the town officers issued the bonds, or intended to issue them, under the authority of, or in pursuance of, the Act of March 2, 1872.*"

This doctrine was reaffirmed in Gibson vs. Dayton, 123 U. S., 59, Bk. 31, L. Ed., 75. The Chief Justice again said:

"It appears on the face of the bonds sued for that the subscription was made under and by virtue of the Act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the 'application in writing of fifty legal voters of said town,' which is in accordance with the provisions of that act. The Act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by 'twenty voters and taxpayers.' The record does not show that any of those who signed

> the application for the meeting at which the vote was taken were taxpayers. It thus appears from the bonds themselves not only that they were issued under the Act of 1857, but that they were not issued under that of 1867."

The people of Taylor county never had anything to do with the passage of either the Act of 1878 or the Act of 1882. The creditors drew both acts, had them enacted by the Legisture and selected their own language expressive of the obligations they desired the county to assume. There is no evidence that anybody in Taylor county ever heard or knew of the Act of 1882 until this proceeding was ended.

The bonds sued on stated on their face that they were issued under the act approved March 18, 1878. Hubbert did not bring himself within the terms of either act.

An inspection of the Act of 1882 would have shown (section 1) that it contemplated the issuance of $150,000.00 of bonds and that it required (section 10) a stipulation or contract as to a special and drastic remedy. The bonds themselves stated that they were of an issue of $125,000.00, the amount authorized by the Act of 1878, and did not contain the stipulation required by the Act of 1882. The Act of March 18, 1878, provided in section 2 that "any *bona fide* holder or owner of any such bond or coupon, issued and delivered as aforesaid, on obtaining a judgment in any court of competent jurisdiction, against the said county, shall, if the county refuses for thirty days after a demand to levy and proceed in good faith to have collected a tax sufficient to pay any such judgment, interest and costs, be entitled, on application to the circuit court, or in vacation to the circuit judge of the Seventh Judicial district, after having notice thereof served on the judge of said county, to have an order made, based on the last preceding assessment, levying a tax and appointing a collector, whose duty it shall be to collect from the taxpayers of Taylor county sufficient to pay off such judgment, interest and costs, and the cost of collecting the same; and the collector so appointed shall have all the power given by law to the collectors of State revenue and county levies, and be liable in like manner," etc.

Hubbert did not show any demand upon the county and

refusal for thirty days to levy a tax. But had he done so, all the law entitled him to was a levy and assessment sufficient to pay his claim and costs, not four or five times the amount of his demand.

VII.

The Act of 1882 had been repealed long before the institution of Hubbert's action.

The Constitution of Kentucky, section 59, is as follows:

> "The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:
>
> "1. To regulate the jurisdiction, or the practice, or the circuits of the courts of justice . . .
>
> "15. To authorize or to regulate the levy, the assessment or collection of taxes, or to give any indulgence or discharge to any assessor or collector of taxes or its sureties."

The schedule of the Constitution provides:

> "1. That all the laws of this Commonwealth in force at the time of the adoption of this Constitution, inconsistent therewith, shall remain in full force until altered or repealed by the General Assembly. * * * The provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions as require legislation to enforce them shall remain in force until such legislation is had, but not longer than six years after the adoption of this Constitution, or unless sooner amended or repealed by the General Assembly."

The General Assembly of Kentucky, by an act approved October 17, 1892, in relation to fiscal courts, declared in sections 7 and 8 thereof, which sections are now also published as sections 1839 and 1840 of the Kentucky Statutes, that:

Sec. 1839. "The fiscal courts shall hold their sessions at the county seats of their respective counties, and shall have jurisdiction to levy each year for county purposes a poll tax on each male inhabitant of the county over twenty-one years of age, not exceeding one dollar and fifty cents, and an *ad valorem* tax on all property subject to taxation within the county, whether belonging to natural persons or corporations, companies or associations, not to exceed fifty cents on each one hundred dollars in value thereof as assessed for State purposes, unless an additional tax be required to enable the county or taxing district thereof to pay the interest on and provide a sinking fund for the extinction of indebtedness of the county or district created prior to September twenty-eighth, one thousand eight hundred and ninety-one, and for that purpose the fiscal court shall have jurisdiction to levy such additional tax as may be authorized by law in force prior to September twenty-eighth, one thousand eight hundred and ninety-one, and shall superintend the collection of all such tax."

Sec. 1840. "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated, to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures and superintend the same; to regulate and control the fiscal affairs and property of the county, make provision for the maintenance of the poor, and provide a poor-house and farm, and provide for the good condition of the highways in the county, and to execute all of its orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying taxes as is by any special act now conferred on the county court or court of levy and claims."

These general laws enacted pursuant to the mandates of the Constitution of Kentucky confided to the fiscal courts

alone all rights and duties pertaining to taxation for county needs of every character.

It was stated in the opinion of the district judge that these laws did not repeal the Act of 1882, although they purported to transfer to the fiscal court all powers and duties with respect to the assessment and levying of taxes for any county purpose. Section 907 of the Kentucky Statutes was quoted as sustaining the view of the court. It reads:

> "All laws and parts of laws which authorize any county or subdivision thereof, or any city, town or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads or gravel roads, are hereby repealed. But nothing in this act contained shall in any wise affect subscriptions of stock, the obtaining or appropriating of money or loaning of credit that may have been made or done before the passage of this act."

This act was passed June 28, 1893, after the foregoing quoted laws had been enacted. But it does not relate to or profess to govern the assessment or levy of taxes; and there is no contention herein by respondent that any stock subscription of Taylor county was invalid. Section 907 of the Kentucky Statutes has no possible concern with any question arising in the case at bar.

The Civil Code of Kentucky, a general law, gives all holders of judgments against Taylor county a complete remedy by the writ of mandamus. Civil Code of Kentucky, sections 474 to 477. Elliott v. Kitchen, 14 Bush, 289. The writ of mandamus is the only appropriate remedy for Hubbert in the Federal Court, and is an "adequate remedy." Thompson v. Allen County, 115 U. S., 550. The petitioner can not pronounce ineffective a remedy which he never tried.

The change of the laws and remedies in relation to taxation for all county purposes in obedience to constitutional mandates, and requiring a uniform procedure in such matters, was within the constitutional rights of the Legislature.

It was said by Mr. Justice Brewer, speaking for the whole court, in League v. Texas, 184 U. S., 156, Bk. 46, L. Ed., 480:

> "Indeed, generally speaking, a party has no vested right in a mere matter of remedy; that is subject to legislative change. And a new remedy may be resorted to unless in some of its special provisions a constitutional right of the debtor or obligor is infringed. 'There is no vested right in a mode of procedure. Each succeeding Legislature may establish a different one, providing only that in each are preserved the essential elements of protection.'"

See, also, Seibert v. Lewis, 122 U. S., 192.

IX.

There being no actual service of process on the Campbellsville Lumber Company, the personal judgment rendered against it was void. (See the judgment, Record, page 21). The Civil Code of Kentucky, section 419, provides that "no personal judgment shall be rendered against a defendant constructively summoned," etc. There is no pretense of any actual summons in this case against the Lumber Company. Were this a proceeding *in rem*, the court could not render a personal judgment. Graham v. Sublett, 6 J. J. Marshall (Ky.), 45. If the Lumber Company was ever before the Circuit Court prior to the last judgment, it was only by constructive service. No personal judgment can be rendered against a defendant constructively summoned and who has not appeared in the action. Harris v. Adams, 2 Duvall (Ky.), 141; Berry v. Berry, 6 Bush (Ky.), 594.

> "A personal judgment against a defendant who is not before the court, either by service of a summons or by entering his appearance is void." Woodside, etc., vs. Dowell, 13 Ky. Law Rep., 141.

The judgment and execution against respondent and other taxpayers (Record, page 70) were personal and general, and were not confined to Taylor county property. They

made all property held by persons also owning property in Taylor county, situated anywhere in Kentucky, liable, for the particular taxes assessed against property in Taylor county. The execution reads:

> "The President of the United States of America, to the Marshal of the Kentucky District: Greeting:—
>
> "You are hereby commanded, that of the estate of the Campbellsville Lumber Company you cause to be made the sum of one hundred and twenty-three and seventy-six one hundredths dollars, which Marc Hubbert lately in our Circuit Court of the United States of America, in the district of Kentucky, sitting in Louisville, recovered against it for debt and also the sum of $1.25, which was adjudged the said Marc Hubbert for his costs by him in that behalf expended, whereof the said Campbellsville Lumber Company is convict, as appears to us of record, and that you have the same before the judges of our said Circuit Court of the United States for the district of Kentucky, at Louisville, on the first Monday in June next, to render unto the said Hubbert his debt and costs aforesaid, and have then and there this writ.
>
> "Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 23d day of April, in the year of our Lord, 1901, and of our independence, the 125.
>
> (L. S.) THOS. SPEED, C. C. C. K. D.
> By Henry F. Cassin, Deputy.
>
> A copy attest: THOS. SPEED, Clerk."

X.

Hubbert had no right to sue in this case, not being the owner of the coupons.

Among the causes assigned by respondent for setting aside the judgment in the case to which it was never a party was (affidavit of Walling, paragraph 3, Record, page 67) "that the plaintiff, Marc Hubbert, at the time of the institution of said suit was not a *bona fide* holder or owner of the

coupons or bonds upon which he obtained judgment, and that he was selected by the bondholders, or owners of said bonds and coupons, they being residents of the State of Kentucky, for the purpose, by a fictitious transfer to him, of obtaining jurisdiction in a Federal Court in Kentucky," etc. See County of Lake v. Harry H. Dudley, 173 U. S., page 243. The respondent raised this point at the "earliest practicable moment," which was immediately after ascertaining that a judgment and execution had been awarded against it in a case to which it was not a party, and in which it had no opportunity to defend.

Hubbert made no attempt to deny that he was not a real party plaintiff.

XI.

The Act of 1882 was always in contravention of the Constitution of Kentucky.

If it had prescribed merely a special method of collecting county taxes, properly levied and assessed by county officers, it might, under the former organic law of the Commonwealth, have been regarded as possibly within the competence of the legislative power, but, as it was designed to confer upon courts of general jurisdiction the power of levying and assessing taxes, it was and is obnoxious to the fundamental laws of the State which divide the three departments of government, and prohibit the exercise by either of powers properly belonging to other branches of the government. The present Constitution of Kentucky, sections 27 and 28 (Kentucky Statutes, page 96); the previous Constitution of Kentucky, sections 1 and 2 (Kentucky Statutes, page 67).

In Pennington vs. Woolfolk, 79 Ky., page 16, the Court of Appeals said:

> "The power to impose taxes is legislative, and can not be conferred, under our Constitution, upon a strictly judicial tribunal or officer. The power to assess property for taxation, that is, to apportion the tax upon the property which the Legislature has imposed it, is not judicial, and can no more be conferred upon a judicial tribunal than the power to levy taxes."

In McLean County Precinct vs. Deposit Bank of Owensboro, 81 Ky., page 254, the Court of Appeals referred to and confirmed the doctrine of the case of Pennington vs. Woolfolk, and held that the power to levy or collect taxes is not one of the inherent powers of any judicial tribunal, that the duty and power are legislative, and that if when the Legislature fails to enact proper legislation or to provide the means of collecting taxes imposed, the judiciary may interpose, the theory of the Government and the distribution of powers would be destroyed.

In the McLean county case, the court quoted with approval from Mr. Justice Matthews, and italicised these words:—

> "*The jurisdiction of courts is confined to compelling the State officers to perform their duties under State laws, and no substitute can be invented.*"

In the case of Slaughter, etc., v. City of Louisville, 89 Ky., pages 121 and 122, the Court of Appeals said: "By the Constitution of the State, the powers of the State are divided into three distinct departments—the legislative, executive and judicial. It is a fundamental principle that neither department can exercise the powers belonging to the other. It is well settled that the valuation of property, for the purpose of *ad valorem* taxes taxation is, in its character, a judicial act. (Cooley on Taxation, page 238). But, by the division of the powers of the Government in this State, it belongs to the ministerial class of duties (Pennington v. Woolfolk, 79 Ky., 13; Cincinnati, &c., R. Co. v. Commonwealth, 81 Ky., 497)." These decisions of the highest court of the State, construing mandates of the Constitution of Kentucky in force at the time the act of 1882 was passed and still in force, and forbidding strictly judicial tribunals to levy or assess taxes, are binding on the Federal Courts.

> "As it is the peculiar province of the highest court of a State to decide whether or not the method pursued in the assessment and collection of taxes is in conformity with the law of the State, this decision is controlling." Bailey vs. Magwire, 22 Wallace, 215, Bk., 22 L. Ed., page 854.

The Iowa act mentioned by our adversaries could never have been enforced in Kentucky without disregarding the uniform construction given to the Constitutions of the State by its highest court; and, moreover, it prescribed no such procedure as is sought herein to be upheld.

The act of 1882 was void, because in conflict with the first section of Article 14 of the Constitution, which prohibits any State from depriving any person of life, liberty or property without "due process of law;" and, assuredly, no State legislation, if legally enacted, could control or regulate the procedure of Federal Courts so as that they would be compelled to ignore the fundamental principles of the Constitution. "It was not the intention of Congress to leave the jurisdiction of the inferior Federal Courts to the regulation or control of State legislation." Mr. Justice Jackson, in speaking for the whole court, said, in Mexican Central R. R. Co. vs. Pinkey, 149 U. S., 194, Bk., 37 L. Ed., 705.

> "But it is well settled that no court can exercise at common law jurisdiction over a party, unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears. Kendall vs. United States, 37 U S., 12 Peters, 524; Harris vs. Hardemon, 55 U. S., 14 Howard, 334."

XII.

The respondent, upon the discovery that an execution had been issued against it, made a motion in the lower court to set aside the judgment on the ground that it was void, and to quash the execution. Having no notice or knowledge before of the judgment against it, this was the proper procedure. The Civil Code of Kentucky, section 763, declares:

> "Neither a void judgment, nor a judgment against a defendant who shall have been only constructively summoned, and shall not have appeared in the action; nor any judgment which can be set aside or modified by the court which rendered it, upon motion made after the term during which it was rendered, shall be reversed or modified by the Court of Appeals, until a

motion to set aside or modify the judgment shall have been made in the inferior court and overruled."

Under the laws of Kentucky, there is no statutory limitation of time within which such motion may be made. In the Federal practice, it was held in the case of the United States v. Wallace, 46 Federal Reporter, 569 and 570, that such a motion could be made at any time. Respondent proceeded promptly.

Respondent asks that the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

ERNEST MACPHERSON,

Counsel for Campbellsville Lumber Co.

Appendix A.

CHAPTER 483.

An Act for the Benefit of Taylor County, Empowering it to Compromise its Debts, Issue Bonds and Levy and Collect Taxes to Pay the Same.

Be it enacted, by the General Assembly of the Commonwealth of Kentucky:

Section. 1. That the county of Taylor be, and it is hereby authorized and empowered to make and enter into any contract or contracts, with any person or persons, corporation or association of persons, for the compromise, purchase, or redemption of any and all bonds, coupons, judgments or other indebtedness of said county, whether the same be due or not due, growing out of the issue of any bonds or coupons heretofore issued by said county; and said county, acting through its county court, and such agents as may be appointed by the county court of Taylor county, are hereby authorized and empowered to execute and carry out such contracts, and for that purpose it is hereby authorized to issue, negotiate and deliver new bonds of said county, not exceeding one hundred and twenty-five thousand dollars, in such amounts as it may deem best, and on such time as the county may think proper, and bearing any rate of interest not exceeding eight per cent. per annum, with coupons attached to represent the interest, payable semi-annually at such time and place as it may think best. The bonds to be signed by the county judge and county court clerk, with the seal of said county attached, and the coupons on said bonds to be signed by the clerk alone. And it shall have the right to sell all or any number of said bonds at not less than their par value, the proceeds of which may be used to buy the present outstanding bonds of Taylor county, at rates not to exceed fifty cents on the dollar, or to exchange the same with the holders of bonds of Taylor county now outstanding, upon such terms as may be agreed to by the holders and the said county court of Taylor county and its agents, upon the surrender and cancellation of the old bonds: Provided, that in such exchange no greater rate shall be al-

lowed in exchange than fifty cents on the dollar for said old bonds. And the county clerk of said county shall keep a record of all bonds issued under this act, showing the date of such bond, when payable, the amount thereof, and the number of coupons attached to each bond; which record shall also show the numb and amount of bonds sold, and the number and amount exchanged for other bonds of said county. The records shall also show the number, amount of bonds and coupons taken up and canceled by sale or exchange of the new bonds, and said record shall be open at all times to the inspection of the taxpayers of said county.

Sec. 2. That the faith and credit of the county of Taylor be, and the same is hereby, pledged to carry out, in good faith, any and all contracts made by it for the issue, purchase, compromise and redemption of any and all bonds and coupons issued under the first section of this act; and any and all bonds and coupons issued and delivered under this act shall be valid and binding on the parties thereto; and any *bona fide* holder or owner of any such bond or coupon, issued and delivered as aforesaid, on obtaining a judgment, in any court of competent jurisdiction, against the said county, shall, if the county refuses, for thirty days after demand, to levy and proceed in good faith to have collected a tax sufficient to pay any such judgment, interest and costs, be entitled, on application to the circuit court, or, in vacation, to the circuit judge of the seventh judicial district, after having notice thereof served on the judge of said county, to have an order made, based on the last preceding assessment, levying a tax and appointing a collector, whose duty it shall be to collect from the taxpayers of Taylor county sufficient to pay off such judgment, interest and cost, and the cost of collecting the same; and the collector so appointed shall have all the power given by law to the collectors of State revenue and county levies, and be liable in like manner; *Provided, also*, that any collector appointed under this section shall, before he proceed to act, execute a bond, with good solvent surety, to be approved and attested by the judge of the said district, the same to be by him delivered to the Taylor county court clerk for safe keeping; and should the county court, held by county judge and justices, or by the county judge, fail, for ten days after demand in writing, to levy and pro-

ceed in good faith to collect a tax as provided in this act, then, and in that event, it is hereby made the duty of the circuit court, or judge thereof in vacation, being informed of such failure by any *bona fide* bond-holder or his attorney, to levy and have collected, as in case of a judgment, a tax to pay off semi-annual interest on past due coupons of bonds issued under this act, of which application the county court or judge thereof shall have ten days' written notice.

Sec. 3. That if at any time all the justices of the peace of Taylor county shall resign, or if at any time the number of justices, from death, resignation or other cause, be reduced to a less number than a majority of all the justices to which, by law, said county is entitled, then, and in that event, the county judge of said county, sitting as a court, shall have and exercise all the powers of the county court of Taylor county, within the meaning and purview of this act, and possess and exercise all the powers conferred upon the Taylor county court by this act.

Sec. 4. That it shall be the duty of all collectors appointed under the provisions of this act to make monthly reports, under oath, to the county treasurer of Taylor county of all moneys collected by him or them; and such collectors shall at once pay over to the county treasurer the amount of all moneys collected by him, less the commissions allowed by law or order of the court or judge making the levy. And it is hereby made the duty of the treasurer of Taylor county to deposit all moneys collected under the provisions of this act, so soon as he receives the same, in some solvent bank, with a paid-up capital of not less than $100,000, to the credit of Taylor county, which money shall be paid out by such bank only upon the check of the treasurer of Taylor county. And no such collector or treasurer shall have the right to use or loan said money, or any part thereof, for any purpose whatever, save and except as provided in this act.

Sec. 5. All such collectors shall collect the entire tax in his hands, and pay the same over to the county treasurer within six months from the time the tax-books are placed in his hands for collection. And it is hereby made the duty of the sheriff of Taylor county to collect all tax levied by the county court under this act; and should he fail for ten days, after the levy of any such tax and notice to him, to execute

bond, with good and sufficient surety, to be approved by the county court, then it shall be the duty of said county court to declare, by order of record, his office of tax collector forfeited. And in that case it is made the duty of the said county court to appoint a tax collector, and take bond from him, with good and approved surety, and fix, by order, the compensation of such collector. And if any sheriff or tax collector shall fail to collect or pay over the taxes, as provided in this act, to the county treasurer, such sheriff or collector so in default shall, with his sureties in his official bond, be liable to an action, on motion on ten days' notice in the Taylor circuit or common pleas courts, in which action the county of Taylor, in its own name, shall recover for any default of the sheriff or collector the amount due the county, with interest from the time it should have been paid, the costs of the action or motion, and ten per cent. damages on the amount found due and recoverable. And should the treasurer of Taylor county fail to pay over any money in his hands when ordered to do so by the Taylor county court, he and his sureties shall be liable in like manner as is herein provided in regard to sheriffs and tax collectors; and the Taylor county court, held by the county judge, shall have the right to require all sheriffs, tax collectors, and the treasurer of Taylor county to renew or give additional surety upon the official bonds of such officers, as often as he may think proper, so as at all times to have securities on said bonds good and solvent for any amount of money in their respective hands.

Sec. 6. That it shall be the duty of Taylor county to have an assessment, make a levy, appoint a collector, and have collected from the taxpayers of Taylor county, upon all property which is now or may hereafter be assessed for, and subject to, State revenue purposes, including the amount given in order to equalize law, to pay the semi-annual interest or past due coupons on all bonds issued under the provisions of this act, and also to pay off and take up the said bonds at maturity; and if the county court shall deem it proper, it may, in addition to the tax herein provided for, levy an additional tax upon the taxable property of said county to create a sinking fund to purchase any or all bonds and coupons issued under the provisions of this act.

Sec. 7. That the county court of Taylor county shall can-

cel all bonds and coupons purchased under the provisions of this act by writing on the face therof, with red ink, the following: "This bond has been bought in by Taylor county, and is not to be reissued;" and the county clerk, in the presence of the county judge, after having made a record of the bonds and coupons purchased under this act, shall burn the same.

Sec. 8. *Be it further enacted*, And as an inducement to the taxpayers of Taylor county to furnish the money with which to at once purchase the outstanding bonds and debts of said county, it is hereby made lawful for the taxpayers, or any of them, of Taylor county, to pay to the county treasurer his or their taxes due, or to become due, to said county, taking his receipt therefor; and all payments so made are declared a valid payment of such a one's share of the taxes due, or to become due, on account of the present indebtedness of said county, to the extent he or they may thus pay; and if the amount of the payment or payments thus made shall be equal to or exceed the whole amount of taxes due, and to become due, by such taxpayer, to take up the bonded debt of said county, then the taxpayer so paying shall be relieved from any further taxes under this act; and should any taxpayer pay, under this section, more than his proper quota of said indebtedness, then it shall be the duty of the county to refund to him the over-plus so soon as ascertained, or as may be agreed upon; and the treasurer of Taylor county shall keep a record-book, in which he shall open an account with the parties making advancements under this section, which book shall be carefully indexed, and show the full names of the payers, the amounts paid, and the date of payment; and the book shall be subject at all times to inspection by the parties making advances, and the Taylor county court and sheriff or collector; and the money or moneys thus collected shall be deposited by the treasurer in like manner as that taken in through the collectors, and be subject to the same restrictions in every respect; and the county court shall make the treasurer a proper allowance for his trouble under this act, to be paid out of the amount collected.

Sec. 9. That if any sheriff, collector, or the county treasurer, or other county officer having charge or control thereof, shall use, loan, or in any way misapply any money or moneys

collected or raised under this act, except the commissions to which, by law, they may be entitled, or shall be a party to any such misapplication of said fund, or any part thereof, or aid or assist any one so offending, shall be guilty of felony, and, upon indictment and conviction, shall be confined to the penitentiary of this Commonwealth for a period of not less than two nor over ten years.

Sec. 10. This act shall be in force and take effect from and after its passage.

Approved March 18, 1878.

Appendix B.

Act of General Assembly of Kentucky, 1881, volume 1, chapter 306, page 558:

An act to amend an act entitled, "An act for the benefit of Taylor county, empowering it to compromise its debts, issue bonds, and levy and collect taxes to pay the same," approved March 18, 1878.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That the word "twenty-five," preceding the word "thousand," in the first section of said act, be, and the same is hereby, stricken out, and the word "fifty" inserted in lieu thereof.

Sec. 2. That in the event judgment shall be rendered on any bond or bonds which may be issued by the county of Taylor under the provisions of the act to which this is an amendment, or on any coupons of any such bond or bonds, such judgments shall constitute a lien upon all real and personal property in said county subject to taxation under the revenue laws of this Commonwealth.

Sec. 3. If the court rendering such judgment shall be of opinion that such serious obstruction is likely to be offered to the enforcement of any such judgment as will materially delay it, it shall, on motion of the plaintiff therein, refer the same to a commissioner, with instructions to ascertain and

report, on a day to be by it named, the amount which it will be necessary for the holders or owners of any such property to pay in order to raise promptly, in proportion to the value of such property owned by each, a sum sufficient to pay the said judgment, and all costs of the said suit, and the costs of collecting the same, making due allowance for probable delinquencies. Upon making any such reference, the said court shall make an order, and if need be, enforce it by process of contempt, directing the officers having charge of the books containing the last assessment for the purposes of State taxation, to deliver them to the said commissioner, to be by him used in making out his report.

Sec. 4. If, for any reason, such assessment books shall not be promptly forthcoming, the court shall provide for a new assessment under the direction and supervision of the said commissioner.

Sec. 5. Upon the completion of said report, the said commissioner shall file same in the clerk's office of said court, and publish in a newspaper published in Taylor or Marion county, once each week for three weeks, a notice of the filing of said report, and stating that the same will be subject to exceptions, to be filed in the said clerk's office, until a day to be mentioned in said notice, which day shall not be less than thirty nor more than forty days from the last day on which the said notice is to be published.

Sec. 6. On a day to be named by the court in the order referring the said judgment to the commissioner, or on the first day of the next regular or special term of the said court after the expiration of the time for filing exceptions, the said exceptions shall stand for hearing, but the hearing thereof may be continued from time to time, for good cause shown, or to suit the convenience of the court.

Sec. 7. When, after such correction as the court may deem proper, the said report shall be approved and confirmed, judgment shall be rendered against the parties named in the report for the amounts therein named, and at the expiration of ninety days from the date of said judgment several executions shall issue against all persons who have not then paid to the sheriff, or other officer who collects executions from said court, for the sums adjudged to be due by them respectively, which may be levied on any property subject

to the State revenue tax held by the defendants, respectively, or which was owned by them at the date of the judgment.

Sec. 8. The court shall make proper orders for the safe-keeping and disposition of the money to be collected under the provisions of this act; and if the amount collected shall be more than necessary to pay the judgment and costs, the residue shall be paid over to the commissioner of the sinking fund of said county, to be used for the payment of the principal and interest of bonds issued under the act to which this is an amendment.

Sec. 9. The sheriff or other officer who may collect such sums as shall be voluntarily paid to him under any such judgments shall be entitled to the same compensation which sheriffs receive for collecting taxes due to this Commonwealth.

Sec. 10. The bonds to be issued under the act to which this is an amendment shall, on their face, stipulate that the holders of any of them, or any coupon thereof, shall be entitled to the remedies for the collection for the same herein, and in the act to which this is an amendment, provided for.

Sec. 11. This act to take effect from its passage.

Approved February 27, 1882.

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NO. 31.

Supreme Court of the United States

OCTOBER TERM, 1903.

Office Supreme Court
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JAMES H. McKENNEY,
Clerk

MARC HUBBERT, - - - - - - - - - - *Petitioner,*

VERSUS

CAMPBELLSVILLE LUMBER CO., - - *Respondent.*

SUPPLEMENTAL BRIEF FOR RESPONDENT.

ERNEST MACPHERSON,
For Respondent.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

MARC HUBBERT, - - - - - - - *Petitioner*,

No. 31. *VERSUS*

CAMPBELLSVILLE LUMBER CO., - *Respondent*.

Supplemental Brief for Respondent.

Since the original briefs were filed herein the petitioner has filed a reply brief which requires to be noticed.

I.

It is argued that the excessive levies were proper because it would be difficult or inconvenient to collect assessments upon many taxpayers for small sums. The same reasoning would justify a plaintiff having many separate items against many defendants in treating the aggregate claim as owing by one only of the defendants, and thus save the cost and trouble of separate executions.

II.

The reply brief, at page 6, Division VII, seems to contend that the general acts cited in respondent's original brief, as repealing the special laws in relation to taxation in counties, are unconstitutional, and cites, among other cases, without quoting, Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437. In that case it is said, page 439:

"It is well settled that while in a general sense the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under that contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies or prescribe new modes of procedure without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract."

It is then asserted in the brief that "the ordinary remedies are plainly inadequate." Why? Petitioner has never tried these remedies. As a matter of fact, these new laws are adequate, and have been enforced without difficulty.

Under the same division of the reply brief, it is urged, secondly, that the new general laws confiding to the Fiscal courts all powers in relation to county taxation did not repeal the special acts of 1878 and 1882 on this subject, and in support of this proposition Long v. City of Louisville, 97 Ky. 376, is relied on. That case merely decided that a suit under a general law filed and pending in the Louisville Chancery Court was unaffected by the new legislation. The Constitution itself excepted such cases.

The brief then cites O'Mahoney v. Bullock, 97 Ky. 774, but fails to quote this language of the court, at page 780:

"Section 171 does provide that 'all taxes shall be levied and collected by general laws,' but if this provision has any application to the state of case in hand the General Assembly has, since the adoption of the Constitution, provided by general laws how all taxes may be levied and collected on behalf of the various counties, and these general laws may be considered as amending or repealing the special provisions of the local act."

The other cases, Pearce v. Mason County, 99 Ky. 364, and Covington v. Highlands, 24 Ky. Law Rep. 433, are, so far as pertinent here, wholly in favor of respondent.

Section 465, Ky. Stats., is an old statute brought into the revision, and relates almost wholly to the criminal law. This section is concerned only with constructive repeals or repeals by implication, and may not be invoked in the construction of a statute which expressly declares that Fiscal courts "shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court, or a court of levy and claims."

Section 907, Ky. Stats., was discussed in respondent's original brief at page 20.

III.

By mistake in printing respondent's original brief, Subdivision VII was not properly numbered, and Subdivision VIII was omitted. The error is of no consequence, although it is anathematized in Latin by opposing counsel. The Seventh Subdivision began on page 17 of respondent's brief, and called attention to the failure of petitioner to make the demand required by Section 2 of the act of 1878, under which the bonds were issued, before making application to the circuit court to levy and assess the taxes. The statute of 1878 made this demand a jurisdictional fact. "Any *bona fide* holder or owner of any such bond or coupon issued and delivered as aforesaid, on obtaining a judgment in any court of competent jurisdiction against the county, shall, if the county refuses for thirty days after a demand to levy and proceed in good faith," etc., apply to the circuit court. The statute itself made a demand and refusal for thirty days a jurisdictional condition precedent. "Where demand is a step in the establishment of a lien, it can not be dispensed with." United States v. Pacific R. Co., 4 Dill. 71. A requirement by statute of demand or personal

notification is imperative. Cones v. Wilson, 14 Ind. 465, 466. Petitioner made no such demand. In a somewhat similar case, Chief Justice Marshall, in Thatcher v. Powell, 6 Wheat. 126, said :

> "We think this ought to have appeared in the record. The argument is that the judgment for these errors in the proceedings of the county court may be voidable but is not void ; that until it be reversed it is capable of supporting those subsequent proceedings which were founded on it. We think otherwise. In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear in order to show that its proceedings are *coram judice*. Without this act of assembly, the order of sale would have been totally void. The act gives the power only on a report to be made by the sheriff. This report gives the court jurisdiction, and without it the court is as powerless as if the act had never passed."

IV.

Considering the sufficiency of the notice to the taxpayers, at page 10 of the reply brief, it is maintained that the tax involved in this case is a general tax, and Turpin v. Lemon, 187 U. S., is supposed to be an authority favorable to petitioner ; but that case was dealing with taxes assessed under a general public law in the ordinary and usual way ; and the court was careful to distinguish such a proceeding from extraordinary, unusual and special levies under particular, private, and special laws. Said the court (page 57) :

> "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential."

In Glidden v. Harrington, 189 U. S., at page 258, this court says:

> "It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive, or unjust that they are declared to be not due process of law."

If to pay county bonds an assessment and levy of a tax of $14,840.00 in order to raise less than $3,500.00, made under a private and special statute not referred to in the contract made by the county, without any actual notice to the taxpayer, and with only a notice by publication not in conformity with the statute and published in a paper foreign to the county, be not an arbitrary, oppressive, and unjust proceeding, it would be difficult to suggest a case that would fall within those terms. Surely, it is oppressive and unjust to levy a tax in such a manner as that a few taxpayers are compelled to pay the entire county obligation. Taxes are not debts in Kentucky, and the New England doctrine, if there be such, that any property-holder is responsible for all the corporate obligations, was never in force in Kentucky, and was never intended to be established under the special acts herein considered.

By levying a tax of $14,840.00 on all the taxpayers in proportion to the value of their property, the object is to raise less than $3,500. By issuing execution against a few of the taxpayers, levies against whom will satisfy plaintiff's claim, the entire indebtedness of the county is imposed upon these few, and about two thousand taxpayers escape. By merely increasing the levy, the whole burden may be placed upon one taxpayer. This arbitrary, oppressive, and unjust levy would under any system of taxation be a nullity.

The opinion of this court, in Rees v. Watertown, 19 Wallace, at page 119, reads:

> "As a part of this theory, the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any

inhabitant of the city, leaving the citizens to settle the equities between themselves. This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights, we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000.00, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of law, even in regard to taxation."

V.

The reply brief asserts that it has never been held in Kentucky that the power to assess and levy taxes may not be conferred on circuit courts. In addition to the cases referred to in respondent's original brief, to the effect that such powers may not be conferred upon circuit courts, Baldwin v. Shine, 84 Ky. 514, may be quoted:

> "The power to impose taxes can not be conferred upon a tribunal which has judicial powers alone; neither is their apportionment or assessment a judicial power. This is well settled in this State."

No Kentucky case hinting even a contrary view has been or can be cited. The same principle seems to prevail in the Federal courts. In Interstate Commerce Commission v. Brimson, 154 U. S., at page 485, Mr. Justice Harlan said:

> "The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not, in any manner, infringe upon the salutary doctrine that Congress (excluding the special

cases provided for in the Constitution as, for instance, in Section 2, Article II, of that instrument) may not impose upon the courts of the United States any duties not strictly judicial."

The Kentucky cases do not rest upon the notion that the courts may not levy or assess taxes because of the absence of legislative authorization, but upon the principle that the State Constitution forbids the exercise by circuit courts of such powers.

Respectfully submitted.

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